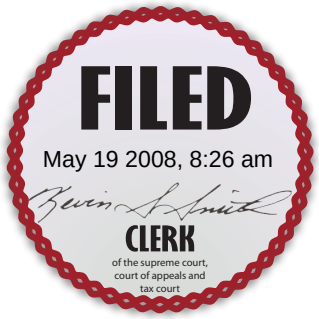

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IN THE
COURT OF APPEALS OF INDIANA

VICTOR ZELINSKY, PATSY M. ZELINSKY, and NORTH SIDE CARRY OUT, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 52A02-0708-CV-713
FIRST FARMERS BANK & TRUST,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause No. 52D01-0612-MF-483

MAY 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendants-Appellants Victor Zelinsky (Victor), Patsy M. Zelinsky (Patsy), and North Side Carry Out, Inc. appeal the trial court's entry of summary judgment and award of attorney fees in favor of Plaintiff/Appellee First Farmers Bank & Trust (Bank).

We affirm in part, reverse in part, and remand.

Appellants present three issues for our review which we restate as:

I. Whether the trial court erred by entering summary judgment in favor of the Bank.

II. Whether the trial court's entry of judgment was improperly premature.

II. Whether the trial court erred by awarding attorney fees to the Bank.

Victor and Patsy are husband and wife. They are also secretary and president, respectively, of North Side Carry Out, Inc. On May 9, 2003, Victor and Patsy, in their capacities as secretary and president of North Side Carry Out, Inc., executed a promissory note ("Note 1") in favor of the Bank for the amount of $252,000. To secure payment of Note 1, Victor issued a personal guaranty, and Patsy issued her personal guaranty secured by a mortgage upon certain real estate. Subsequently, on November 15, 2004, Patsy executed a promissory note ("Note 2") in favor of the Bank in the amount of $119,389.13. Patsy secured Note 2 with two mortgages and a personal guaranty from Victor. On September 9, 2005, Victor executed a promissory note ("Note 3") in favor of the Bank for the amount of $27, 051.79. To secure payment of Note 3, Victor executed a security agreement conveying to the Bank a security interest in a 1975 Chevrolet Corvette automobile.

In November 2006, the Bank informed Victor and Patsy by letter that it considered all three loans to be in default and/or delinquent based upon an attempted payment by Patsy drawn on a closed bank account, Victor's disappearance, and the Bank's determination that neither Victor nor Patsy held title to the Corvette automobile used to secure Note 3. In December 2006, the Bank filed suit against the Appellants and subsequently filed its motion for summary judgment. Following a hearing, the trial court granted the Bank's motion, and this appeal ensued.

Appellants first contend that the trial court erred by granting summary judgment in favor of the Bank because there exist genuine issues of material fact. On appeal from a grant or denial of summary judgment, our standard of review is identical to that of the trial court: whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Winchell v. Guy*, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006); *see also* Ind. Trial Rule 56(C). Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Pond v. McNellis*, 845 N.E.2d 1043, 1053 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 590. All facts and reasonable inferences drawn therefrom are construed in favor of the non-movant. *Id*. Further, we carefully review a summary judgment determination to ensure that a party was not improperly denied its day in court. *Id*. The party appealing the judgment carries the burden of persuading this court that the trial court's decision was erroneous. *Wells v. Auto Owners Ins. Co.*, 864 N.E.2d 356, 358 (Ind. Ct. App. 2007).

The trial court here made certain specific findings of fact in its order. Although such findings facilitate appellate review by offering insight into the trial court's reasons

for granting summary judgment, they do not alter our standard of review and are not binding upon this court. *See Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell*, 848 N.E.2d 738, 747 (Ind. Ct. App. 2006). The basis for the trial court's conclusion is summarized in the following findings:

1. The Defendants have three (3) loan accounts with the Plaintiff as follows:

    A. Account #40339145 – loan dated 5/9/03, taken out by Northside Carry Out, Inc. executed by its officers, Patsy M. Zelinsky, President and Victor Zelinsky, Secretary.

    B. Loan #40429391 – loan dated 11/15/04, taken out by Patsy Zelinsky.

    C. Loan #40471112 – loan dated 9/9/05, taken out by Victor Zelinsky.

2. That both Victor and Patsy Zelinsky executed guarantees to secure the loan for Northside Carry Out, Inc.

3. That the loan to Northside Carry Out, Inc. was secured by a mortgage loan on certain real estate located in Wabash County, Indiana.

4. That Patsy's loan was secured by a mortgage on certain real estate in Cass County, Indiana.

5. That Victor Zelinsky's loan has not been paid. That he gave security for this loan to be a 1975 Chevrolet Corvette, but the parties agree that Victor Zelinsky never had title to the security. Victor Zelinsky also executed at the time of the loan a Commercial Security Agreement. Said Security Agreement not only claims the Chevrolet Corvette as security but also provides that the security is for all debts by Victor Zelinsky including present and future debts.

6. That Patsy Zelinsky issued check #1419 to the Plaintiffs for payment on account #40339145. That said check was drawn on a closed account and the amount of that check, $2,251.00 remains unpaid.

7. That Victor Zelinsky's whereabouts were unknown to the Plaintiff and also to Patsy Zelinsky for approximately six (6) weeks between the time period of September 13th and October 30th, 2006.

8. That the Plaintiff made a demand on the loans by letter drafted by Attorney Jeffry Price dated November, 2006. Said letter of demand declared the loans in default and requested immediate payment.

9. That the loans taken out by the Defendants included a clause defining default. The relevant portion of that clause indicates that if the Defendants make a written statement or provide any financial information that is untrue or inaccurate at the time it was provided a default occurs. A further provision under the default indicates that the Defendants do or fail to do something which causes the Plaintiff to believe that the Plaintiff will have difficulty collecting the amounts owed by Defendants.

10. That the giving of security by Victor Zelinsky in the 1975 Corvette which he did not own, Victor Zelinsky's disappearance for approximately six (6) weeks and Patsy's [sic] Zelinsky's issuance of a check to the Plaintiff on a closed account, still unpaid, qualify as a default under Sections 6 and 7 of the loan contracts.

Order granting Bank's motion for summary judgment, Appellant's App. at 6-8.

The three notes involved in the present case were included in the designated materials for the summary judgment motion and all contain a definitions section where it is set forth that the terms "I," "me," or "my" refer to each borrower who signs the note and each person or legal entity, including guarantors, who agree to pay the note. Appellant's Appendix at 22, 32, and 45. Each note also contains a section entitled "DEFAULT," which states, in pertinent part: "I will be in default if any one or more of the following occur: (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount

I owe you . . .” Appellant’s App. at 22, 32, and 45. The notes further provide, as a remedy for the default of the borrower, guarantor, endorser or surety, that the lender may demand immediate payment of all that is owed under each note. Appellant’s App. at 22, 32, and 45. Here, however, the Appellants are not contending that the remedy sought by Bank was improper. Rather, the Appellants argue that Bank’s claim of insecurity under sub-section 7 of the Default provisions of the notes was not in good faith.

Ind. Code § 26-1-1-208 provides:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. *The burden of establishing lack of good faith is on the party against whom the power has been exercised.*

(Emphasis supplied).

In support of its motion for summary judgment, Bank has designated its complaint and all attachments, including the three notes at issue here and their attachments, as well as the affidavit of a loan officer employed by Bank. These documents show the execution of the three notes by Appellants, including all the terms of the notes and the guarantees. The loan officer’s affidavit states that all three notes are in default. He further states that Patsy had an outstanding unpaid check that was made payable to Bank and was drawn upon a closed account and that Bank had learned that neither Victor nor Patsy had title to the 1975 Chevrolet Corvette that was used to secure Note 3.

In opposition to Bank’s motion, Appellants designated certain documents, including a letter to Victor and Patsy from Bank’s attorney informing them that the three

loans were considered to be in default and/or delinquent and indicating that the attempted payment by Patsy with a check drawn on a closed account, Victor's disappearance, the lack of title in either Victor or Patsy to the 1975 Corvette, and the fact that Victor's loan was already in default were the basis for the bank's determination of insecurity. In his affidavit, Victor denied having knowledge that he did not have clear title to the 1975 Corvette, and he admitted that his whereabouts were unknown from September 13, 2006 to October 30, 2006. In Patsy's affidavit, she affirms that she did not know the whereabouts of Victor from September 16, 2006 to October 30, 2006.

Appellants' claim of lack of good faith on the part of Bank is not supported by the evidence. Rather, the bank had valid reasons for deeming itself insecure. As to Note 1, upon which Victor and Patsy were both guarantors, Bank presented evidence that Patsy attempted a payment on Note 1 with a check drawn on a closed account in the amount of $2,251.00, and the check remains unpaid. Although Patsy did not address this allegation in her affidavit, in Appellants' answer to Bank's complaint she admitted that the check had been returned unpaid and that it had been drawn on a closed account. In addition, Bank alleged that Victor had an unexplained absence during which Patsy did not know his whereabouts. Both Patsy and Victor admit in their affidavits that Victor's whereabouts were unknown from September 13 or 16, 2006 to October 30, 2006. Finally, Bank presented evidence that neither Patsy nor Victor held good title to the 1975 Corvette that was used to secure the loan to Victor in Note 3. Appellants' evidence does not dispute the lack of good title. Victor merely states that he was not aware that he did not have clear title to the vehicle. With regard to Note 2, which was a loan to Patsy with

Victor's guaranty, the parties presented the same evidence as they did for Note 1. As to Note 3, which is the loan to Victor secured by the Corvette, Appellants concede that it is in default.

The actions of both Patsy and Victor are in question for both Notes 1 and 2. Sub-section 7 of the Default provision of each of the Notes states: "I will be in default if any one or more of the following occur: (7) *I* do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you . . ." Appellant's App. at 22, 32 (emphasis supplied). "I" is defined in all of the Notes as including each borrower, as well as any guarantors. Further, Sub-section 7 of the Notes is a provision of insecurity subject to Ind. Code § 26-1-1-208, which places the burden of showing a lack of good faith on the party against whom the provision has been employed. Here, Appellants did not meet their burden of proving that Bank did not in good faith deem itself insecure. Thus, summary judgment was properly granted.

As their second allegation of error, Appellants claim that the trial court's judgment was premature. At the close of evidence at the hearing on summary judgment, the trial court told the parties it would take the matter under advisement and gave them ten days to submit any supplemental authority. Seven days later, prior to Appellants' submission of their supplemental authority, the trial court issued its ruling granting summary judgment. Based upon these facts, Appellants assert that the trial court's judgment was improperly premature. In short, we find this argument unavailing because Appellants have neither alleged nor demonstrated any harm.

Finally, Appellants aver that the trial court abused its discretion by ordering an award of attorney fees. We review a trial court's award of attorney fees for an abuse of discretion. *Gary/Chicago Airport Bd. of Authority v. Maclin*, 772 N.E.2d 463, 470 (Ind. Ct. App. 2002). Therefore, we will not reverse the trial court's decision unless the award is clearly against the logic and effect of the facts and circumstances before the court. *Id*. In determining the reasonableness of attorney fees, we look to our Rules of Professional Conduct for guidance as to factors to be considered. *Benaugh v. Garner*, 876 N.E.2d 344, 347 (Ind. Ct. App. 2007), *trans. denied* (2008). Specifically, Professional Conduct Rule 1.5(a) provides a non-exhaustive list of factors to consider:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Here, Bank requested attorney fees of $21,000 on Note 1, $10,000 on Note 2, and $2,500 on Note 3. In support of this request, Bank submitted to the trial court an affidavit of Mark Jones, Senior Vice President of Bank. Jones' affidavit simply states that he

"verily believes a reasonable attorney's fee" to be $21,000, $10,000, and $2,500 on each of the three notes, respectively. Affidavit of Mark Jones, Appellant's App. at 97.

We do not believe an in depth review of the factors listed in Professional Conduct Rule 1.5(a) is necessary in the instant case. Generally, we observe that Bank's attorney has most likely expended only limited time in these circumstances. He has filed Bank's complaint with the trial court and filed Bank's motion for summary judgment. Additionally, we note no novel issues involved in the case thus far. The factor, however, that causes us pause is the fact that the only evidence produced to support the claimed amount of attorney fees is the affidavit of an employee of Bank. Jones' affidavit merely attests to his belief that the attorney fees are reasonable. Significantly, it fails to provide evidence that proves the amount due. In addition to establishing their right to recover an attorney fee, plaintiffs in actions on promissory notes must also establish, by proper evidence, the amount of the attorney fee. *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 950-51 (Ind. Ct. App. 2006) (*citing Smith v. Kendall*, 477 N.E.2d 953, 954-55 (Ind. Ct. App. 1985)). Jones' affidavit does not provide sufficient evidence with which the trial court could determine a reasonable amount of attorney fees. *See Id*. at 951 (determining that affidavit of plaintiff's attorney which stated that he and attorneys from his firm had expended 80.4 hours of work on case at rate of $150 to $200 per hour was insufficient to establish attorney fees).

Based upon the foregoing analysis and discussion, we conclude that the trial court properly entered summary judgment in favor of Bank. Further, we conclude that Appellants failed to establish any prejudice in support of their claim that the trial court's

judgment was improperly premature, and that there was insufficient evidence presented as to attorney fees. Accordingly, we remand this case to the trial court on the issue of attorney fees only, with instructions to request the parties to present additional evidence for an accurate determination of the award.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and CRONE, J., concur.